

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

PATRICK FLEETWOOD Et. Al.,

NO. 2:20-CV-355-SAB

Plaintiffs,

vs.

WASHINGTON STATE UNIVERSITY,

PLAINTIFFS'
SUPPLEMENTAL BRIEFING
RE DAN PATTERSON
DEPOSITION

Defendant.

Pursuant to the Court's March 16, 2022, Order, Plaintiffs submit the following supplemental briefing regarding Dan Patterson's deposition. Plaintiffs first address what Mr. Patterson's deposition revealed and then explain why that testimony creates issues of material fact.

A. What the testimony from Mr. Patterson's deposition revealed.

1. Mr. Patterson is the Army Cadet Command's 8th Brigade's Director of Operations which means he is the second highest supervisor in a military

1 organization that oversees ROTC programs at 145 universities across America.
2 (Crotty Decl. *citing* Patterson Dep. 4:18-22; 39:5-25; 40:1)
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4 2. Some unknown person representing Defendant WSU gave Mr.
5 Patterson the declaration he signed in this case (ECF No. 36), that declaration
6 contained numerous exhibits, but Mr. Patterson never read the exhibits (“packet”)
7 that were attached to his declaration; instead, he set the package “on my coffee table
8 in my office. Never read it, didn’t read it.” (Patterson Dep. 6:2-4; 8:13-25; 9:1-17
9 & Ex. 1)

10 3. Regarding the “packet”/exhibits to his declaration that Mr. Patterson
11 “never read”, Mr. Patterson testified that he (a) did not know who modified certain
12 exhibits to his declaration (b) did not know whether those unknown persons used a
13 certain system to create the documents attached to his declaration, (c) did not talk
14 to the creators of the exhibits attached to his declaration to confirm/deny whether
15 they used any system in creating the documents, (d) “assumed” but did not know
16 whether the creators of certain documents attached to his declaration were operating
17 under a duty of accuracy and took no steps to check the accuracy of the documents
18 attached to his declaration, and (e) did not draft the documents attached to his
19 declaration. (Patterson Dep. 14:11-22; 17:8-25; 18:5-18; 20:6-12, 24-25; 21:1-12;
20 23:2-25; 24:1-25; 25:1; 29:6-25; 30:1-25; 31:1-2; 48:19-20; 49:7-14 *citing* ECF No.
21 36 at Exs. 3, 4, and 5)

1 4. Mr. Patterson did not know whether WSU ROTC planned on
2 convening a disenrollment board *before* WSU determined whether Mr. Fleetwood
3 violated EP 15 nor did Mr. Patterson know if WSU's determination that Patrick
4 Fleetwood violated EP 15 was the reason ROTC began the disenrollment process.
5 (Patterson Dep. 15:5-21) Mr. Patterson agreed that the ROTC disenrollment board
6 was presented with WSU's June 13, 2019, investigation report (which found Patrick
7 Fleetwood in violation of EP 15) as part of the disenrollment proceedings.
8 (Patterson Dep. 31:24-25; 32:1-25)
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10 5. Mr. Patterson testified that "first actions are always taken by the
11 University's Title IX office" in the context of Army ROTC deciding whether to
12 take adverse action against a ROTC cadet. (Patterson Dep. 25:23-25; 26:1-22; 27:5-
13 20 *citing* Exhibit 3 to Exhibit 5 (bate number 04010096)) Mr. Patterson has seen no
14 document (such as a military commander's inquiry (called an AR 15-6
15 investigation)) that leads him to believe the "normal procedure" (ROTC acting off
16 of the university's Title IX determination in deciding to start disenrollment
17 proceedings) was not followed regarding Patrick Fleetwood's dismissal from
18 ROTC. (Patterson Dep. 28:6-18, 22-25; 29:1-5)

19 6. Mr. Patterson was aware of no other information (other than finding
20 27 of WSU's June 13, 2019, investigation) that the WSU disenrollment board
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1 considered in determining that Patrick Fleetwood sent nude videos to others.
2 (Patterson Dep. 34:1-23)
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4 7. Mr. Patterson could not think of any instance (other than the Patrick
5 Fleetwood matter) where a cadet accused of misconduct asked for information from
6 his or her university in the context of contesting a disenrollment but did not receive
7 that information. (Patterson Dep. 37:1-25; 38:1-4)

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9 **B. Why Mr. Patterson's deposition creates issues of material fact.**

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11 **1. *The documents attached to Mr. Patterson's declaration do not satisfy
a hearsay exception and should be excluded.***

12 The business record exception to the hearsay rule “applies only if the person
13 furnishing the information to be recorded is ‘acting routinely, under a duty of
14 accuracy, with employer reliance on the result, or in short ‘in the regular course of
15 business.’” *United States v. Pazsint*, 703 F.2d 420, 424 (9th Cir. 1983). While the
16 person authenticating the business records need not be the person who prepared or
17 maintained those records, that person must “understand[] the system used to prepare
18 the records.” *Samsung Elecs. Co., Ltd. v. Huawei Techs. Co., Ltd.*, 2018 WL
19 6380662, at *12 (P.T.A.B. Dec. 4, 2018)(citing *Conoco Inc. v. Dept. of Energy*, 99
20 F.3d 387, 391-392 (Fed. Cir. 1996)).

21

22 Since Mr. Patterson testified he did not know the system by which Exhibits
23 3, 4, and 5 of his declaration were prepared those exhibits should be excluded. In
24 fact, the Court would be within its discretion to exclude all of the declaration

1 exhibits because Mr. Patterson testified that he never read them and since Mr.
2 Patterson never read the records he cannot credibly testify whether those records
3 were “(a) made at or near the time from information transmitted by someone with
4 knowledge, (b) kept in the course of a regularly conducted business activity, and (c)
5 made as a regular practice of that activity.” Fed. R. Evid. 803(6). Accordingly, since
6 Defendant cannot show the exhibits in Mr. Patterson’s declaration are admissible
7 under a hearsay exception the documents should be excluded, which, in turn further
8 creates issues of fact as to whether WSU or Army ROTC was the cause of Mr.
9 Fleetwood’s harm.

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13 ***2. Army ROTC programs, like WSU, wait to take disenrollment action
14 after the university investigates which, in turn, supports Mr.
15 Fleetwood’s theory that but for WSU’s (now reversed) finding that
16 Mr. Fleetwood violated EP 15 no disenrollment action would have
happened.***

17 Defendant moved for summary judgment arguing that since it wasn’t
18 involved in the ROTC disenrollment process it is not responsible for Mr.
19 Fleetwood’s dismissal from ROTC. (ECF No. 32, p. 1 – 2) In response Plaintiffs
20 argued “but for [WSU] OEO’s wrongful finding that Fleetwood violated EP 15,
21 ROTC would not have initiated its [disenrollment] process.” (ECF No. 37, p. 4) Mr.
22 Fleetwood support that argument with reference to his ROTC supervisor (LTC
23 Hobbs) email “I as the PMS will make a recommendation based on the OEO’s
24 findings and determinations” and citation to *Ballard v. Tri-Cty. Metro. Transp. Dist.*

1 *of Oregon*, 2011 WL 1337090, at *18 (D. Or. Apr. 7, 2011) for the proposition that
2 Ninth Circuit case law supports Mr. Fleetwood’s domino theory of causation
3 meaning that had WSU not concluded Mr. Fleetwood violated EP 15 ROTC would
4 not have started the disenrollment process. (ECF No. 37, p. 17, 19)

5 Mr. Patterson’s testimony supports Mr. Fleetwood’s causation theory.

6
7 *First*, Mr. Patterson did not know whether WSU ROTC planned on
8 convening a disenrollment board *before* WSU determined whether Mr. Fleetwood
9 violated EP 15 nor did Mr. Patterson know if WSU’s determination that Patrick
10 Fleetwood violated EP 15 was the reason ROTC began the disenrollment process.
11
12 Mr. Patterson agreed that the ROTC disenrollment board was presented with
13 WSU’s June 13, 2019, investigation report (which found Patrick Fleetwood in
14 violation of EP 15) as part of the disenrollment proceedings.

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16 *Second*, Mr. Patterson testified that “first actions are always taken by the
17 University’s Title IX office” in the context of Army ROTC deciding whether to
18 take adverse action against a ROTC cadet and that he saw no document which led
19 him to believe the “normal procedure” (ROTC acting off of the university’s Title
20 IX determination in deciding to start disenrollment proceedings) was not followed
21 regarding Patrick Fleetwood’s dismissal from ROTC.

22
23 *Third*, Mr. Patterson was aware of no other information (other than finding
24 25 of WSU’s June 13, 2019, investigation) that the WSU disenrollment board
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1 considered in determining that Patrick Fleetwood sent nude videos to others.
2 Finding 27 of WSU's June 13, 2019, investigation was “[t]he Respondent sent
3 sexually inappropriate videos to several Program members. Student C provided the
4 names of Student E, Student F, and Student G as individuals who he knew had
5 received photos and videos.” (ECF No. 34, pg. 63 *citing* WSU OEO Report Finding
6 of Fact 27) The reason Army ROTC cited in deciding to remove Mr. Fleetwood
7 from ROTC and repay his scholarship was “[t]he sending out of explicit videos and
8 showing other Cadets naked and inappropriate photos of women is not something a
9 Cadet of Character would do and is not in compliance with the Army Values.” (ECF
10 No. 36, pg. 34) Taken together, Mr. Patterson’s inability to point to any factor (other
11 than WSU’s (now overturned¹) determination that Mr. Fleetwood violated EP 15
12 by, *inter alia*, sending inappropriate videos, creates a jury question regarding
13 whether WSU Army ROTC would have taken any action had WSU not (improperly
14 and in deviation from procedure (ECF No. 38, ¶¶198 - 206) widened its investigation
15 into conduct by Mr. Fleetwood that had nothing to do with Ms. Kostecka and
16 happened years earlier.

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23 _____
24 ¹ Recall that on September 21, 2021, the Whitman County Superior Court signed
25 an order setting aside WSU’s finding that Mr. Fleetwood violated EP 15. See ECF
26 No. 40-6.

1 DATED this April 25, 2022.
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4 **CROTTY & SON LAW FIRM, PLLC**
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties, if any, shall be served in accordance with the Federal Rules of Civil Procedure.

Dated this April 25, 2022.

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